90-412



No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DAVID WELLS EDGAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KENNETH R. BROWN
BROWN & COX
10 West 300 So., #500
Salt Lake City, Utah
(801) 363-3550
Attorneys for Petitioner

## QUESTIONS PRESENTED FOR REVIEW

1. Under the "objective standard" regarding police conduct in connection with the formulation of reasonable articulable suspicion, were there sufficient "objective" facts to justify the petitioner's detention and seizure of incriminating evidence, or was the seizure unconstitutional as violative of the Fourth Amendment to the United States Constitution.

## LIST OF PARTIES IN THE PROCEEDINGS BELOW

The caption of the case in this court contains the names of all parties in the court below.

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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

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October Term, 1989

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DAVID WELLS EDGAR,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

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## OPINION BELOW

The Opinion issued by the United States Court of Appeals for the Tenth Circuit appears as Appendix "A" to this Petition. The Opinion was issued and

filed with that Court on May 21, 1990, as a nonpublished opinion and does not appear in the official reporting services.

## JURISDICTION

The Opinion in the United States Court of Appeals for the Tenth Circuit was issued on May 21, 1990, and filed with the Court.

A timely Petition for Rehearing was filed with the United States Court of Appeals for the Tenth Circuit, and an Order denying that Petition for Rehearing was filed on June 12, 1990. A copy of that Order denying petitioner's Petition for Rehearing appears as Appendix "B" to this Petition.

Jurisdiction of this Court is envoked pursuant to 28 U.S.C., 1254 (1) and U.S.C.S. Court Rules, Supreme Court Rule 17.1(a) and (b).

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S.C.S. Constitution Amendment 4 provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

### Federal Jurisdiction:

Petitioner Edgar was convicted of the crime of possession of a controlled substance with intent to distribute in

violation of 21 U.S.C., § 841(a)(1) (1982).

A timely Notice of Appeal was filed pursuant to Rule 4B(f) of the Federal Rules of Appellate Procedure.

Jurisdiction in the District Court was conferred by 18 U.S.C. 3231. Jurisdiction in the United States Court of Appeals for the Tenth Circuit was conferred by Title 28 U.S.C., § 1291.

## Facts Material to the Consideration of Questions Presented

On November 30, 1988, the Utah Highway Patrol and the Grand County Sheriff's Office established a roadblock 50 miles northeast of Moab, Utah on Interstate 70, eastbound. (Tr. Hearing-

2/15/89, at 4)

Ostensibly, the purpose of the roadblock was to check drivers' licenses and registrations on all vehicles traveling eastbound on Interstate 70. The stated exception to this was that of long-haul truckers. (Tr. Hearing 2/15/89, at 6)

At a hearing on petitioner's Motion to Suppress, the police officer testified that the roadblock operated, as to each vehicle that came through, in the following fashion: all eastbound traffic, with the exception of long-haul truckers, was stopped at the roadblock and channeled into a single lane of traffic, that being the right-hand lane

of traffic. From the right lane of traffic, all cars were diverted to the park lane or far right side of the freeway, where officers would require that the driver produce has driver's license and registration. The officer, in addition to examining these documents, would then make a physical examination of the vehicle for equipment violations. (Tr. Hearing 2/15/89, at 41-42) This process was estimated to take approximately five minutes for each car. (Tr. Hearing 2/15/89, at 28)

There were a total of five citations issued to travelers at this roadblock. (Tr., Hearing 2/15/89, at 57, doc. 22 at 2) Four of the five citations were

issued to drivers of out-of-state vehicles. (Doc. 22) Two of the persons who were issued citations were located by petitioner and testified at the Suppression Hearing. Since they arrived at the roadblock at different times, they offered a general description as to how the roadblock was being operated.

The first of the two witnesses to approach the roadblock was George Webb from Boulder, Montana. (Tr. Hearing 2/15/89, at 66) He testified that he received the citation at the roadblock at 12:35 p.m. (Tr. Hearing 2/15/89, at 67) He was at the roadblock for a period of approximately one-half hour, during which time his vehicle was searched twice and

he was issued a traffic citation. (Doc. 22 at 2) He testified that during that one-half hour period, certain cars were not being pulled over to the far right side of the freeway and only brief contact (1-2 minutes) was made with the drivers. These persons were stopped in the lane of travel (as opposed to the far right as Deputy Brewer had testified) and there may have been verbal contact with these individuals. However, Mr. Webb did not observe any documents being exchanged and described these people as "family types." He was certain that they did not pull over to the far right side of the freeway or parking strip and they were simply briefly contacted by the police

officers and then waived through the roadblock. (Tr. Hearing 2/15/89, at 70)

Another person from Nebraska by the name of Michelle Simms, arrived at the roadblock approximately 20 minutes prior to the petitioner and made certain observations regarding how the roadblock operated. (Tr. Hearing 2/15/89, at 60)

She testified that during the time between her vehicle being stopped and the time petitioner's vehicle was stopped, there were approximately three vehicles simply waived through the roadblock without producing any documents. (Tr. Hearing 2/15/89, at 61 and 64) During this period of time, there were sufficient officers to operate the

roadblock and obtain documents from the vehicles, but they did not. (Tr. Hearing 2/15/89, at 64) The officers simply made some observations regarding the occupants and waived the cars through the roadblock. (Tr. Hearing 2/15/89, at 65)

After the Simm's vehicle had arrived at the roadblock, petitioner approached the roadblock. Deputy Curt Brewer approached petitioner, who was the lone occupant of the vehicle, and directed that he park his vehicle to the extreme right of the parking strip. (Tr. hearing 2/15/89, at 8-9) Petitioner was asked to produce his driver's license and registration, which he did. The officer determined that the vehicle was properly

registered to another person and that petitioner was properly licensed with a California driver's license. The vehicle was also registered in California and bore California license plates. (Tr. hearing 2/15/89 at 11) Noticing that the vehicle was registered to another person, the officer inquired of petitioner whether or not he had permission to drive the vehicle. Petitioner assured the officer that he had the owner's permission. (Tr. Hearing 2/15/89, at 12) Apparently, the officer was not concerned about this fact because he testified that it was not unusual for a car to be loaned to someone else. (Tr. Hearing 2/15/89, at 33-34) He made no effort at that

point to run an N.C.I.C., and did not, until well after petitioner's arrest. (Tr. Hearing 2/15/89, at 51)

The officer testified that during his encounter with petitioner, Mr. Edgar "seemed a little bit nervous." (Tr. Hearing 2/15/89, at 13) On cross-examination regarding that "nervousness", the following exchange occurred:

> Q. I am trying to find out what it is that made you feel he was nervous. What I am getting is that he looked straight ahead, is that correct?
>
> A. That is correct.
>
> Q. And other than that, that is all you can tell the court as to your perception of nervousness?
>
> A. That is correct.

(Tr. Hearing 2/15/89, at 36)

Because of that perception of "nervousness", the officer did not "feel comfortable" in allowing Mr. Edgar to drive away. He testified that in a typical roadblock stop when he was through examining the documents, he would simply say "thank you", which would be a clear indication to the driver that he was free to go. In this case, because of his perception of "nervousness", he never said to petitioner, "thank you", or gave any indication that he was free to go. (Tr. Hearing 2/15/89, at 53)

Two other circumstances seemed "suspicious" to the officer. The first of those was what the officer described as the "cleanliness" or the absence of

items in the car.[1] However, on cross-examination, all of the things which he thought to be "unusual" in not being present in the car, he testified, were indeed present in the interior of the vehicle, with the exception of a blanket. (Tr. Hearing 2/15/89, at 39) Additionally, the vehicle had skis and ski poles on top of the car and ski boots in the trunk. Regarding the contents of the vehicle, the following exchange

---

[1] The officer testified on direct that skiers have parkas, sunglasses, gloves, food items and blankets in their vehicles. During cross-examination, he testified that appellant had in his vehicle sunglasses, food items, a jacket and skis attached to the top of the car. (Tr. Hearing 2/15/89, at 37-38)

occurred:

> Q. But somehow whatever they have (skiers) although we don't know, his didn't have. Is that correct?
>
> A. To a certain extent.

The only other "suspicious" circumstance in the officer's mind was a smell emanating from the car which he said was consistent with after shave lotion. There was nothing unusual about such a smell. During an inventory of the car after petitioner's arrest, officers discovered some air fresheners which were still factory sealed in plastic in the car's glove compartment. (Tr. Hearing 2/15/89, at 41)

The officer testified he did not "feel comfortable" in allowing petitioner

to drive away, and for that reason, he continued to investigate and ask petitioner questions while never indicating to petitioner that he was free to leave. He asked petitioner to exit the vehicle and allow a search of the trunk of the vehicle. After further search and investigation, cocaine was located in a hidden compartment under the trunk. (Tr. Hearing 2/15/89, at 20)

## ARGUMENT

### POINT I

**UNDER THE OBJECTIVE STANDARD AS ARTICULATED BY THIS COURT IN CONNECTION WITH THE FORMULATION OF REASONABLE, ARTICULABLE SUSPICION, THERE WAS NOT SUFFICIENT "OBJECTIVE" FACTS TO JUSTIFY THE PETITIONER'S DETENTION AND THE SEIZURE OF INCRIMINATING EVIDENCE.**

This Court, in United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870 (1980), established the objective standard in determining whether or not an individual is seized for Fourth Amendment purposes, in holding as follows:

> A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstance surrounding the incident, a reasonable person would have believed that he was not free to leave.

Most recently, the United States Supreme Court followed the Mendenhall standard in Michigan v. Chesternut, ____ U.S. ___, 43 Cr.L. 3077, holding as follows:

> The appropriate test is whether a reasonable man, viewing the particular police conduct as a whole and within the setting of all the

> surrounding circumstances, would have concluded that the police had in some way restrained his liberty so he was not free to leave.

In the Chesternut case, the police were on routine patrol and observed a person running away from an establishment on foot. They accelerated their police car and drove along side of the individual and observed him discarding evidence. The officers stopped and determined that the material he had discarded was pills containing codeine. They then gave chase and arrested him. He sought to suppress the evidence he discarded. The highest state court agreed with this contention.

The United States Supreme Court reversed finding that under the

"reasonable man" standard he had not been seized at the time the officers gave chase.

The Court commented on the objective standard and gave the rationale for the standard as follows:

> While the test is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings, it calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police. The test's objective standard--looking to the reasonable man's interpretation of the conduct in question--allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment. [citations omitted] This "reasonable person" standard also insures that the scope of the Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.

In the instant case, there is no question that petitioner was seized for Fourth Amendment purposes when he entered the roadblock. The officer testified that persons did not have the option of going around the roadblock. All cars were stopped and had anyone attempted to go around the roadblock, the officers would have given chase. The question in this case is whether or not at any point in time, after his initial seizure, a reasonable person would have believed he was free to go. Did the officers ever give clear indication that petitioner was free to leave, such that a reasonable person would have believed that he was no longer seized for Fourth Amendment

purposes. The answer to this question must be "no". From the time of this entry into the roadblock until the discovery of cocaine, his freedom of movement was significantly restricted in that he was under the direct control of the police officers. He was directed to provide certain documentation. Certain questions were put to him and he was never told by the officer that he was free to leave. A reasonable person would believe that until the officer gave him a clear indication that he was free to leave by saying "thank you" or "you may leave" that he was not free to leave. In the instant case, the officer never indicated to petitioner that he was free

to leave. He never said "thank you" or words to that effect. Did the officer believe he had released the petitioner? No. The officer did not intend to convey to petitioner that he was free to go.

As recently as April 1989, this Court, in United States v. Sokolow, 109 S.Ct. 1581 (1989) reaffirmed the continued vitality of the objective standard where this court said:

> The officer, of course, must be able to articulate something more than an "inchoate and unparticularized suspicion or hunch". The Fourth Amendment requires "some minimal level of objective justification" for making the stop . . .
>
> A court sitting to determining the existence of reeasonable suspicion, must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a

"profile" does not somehow detract from their evidentiary significance as seen by a trained agent.

With this in mind, this Court should consider the "articulated" facts under the "objective standard" to determine whether or not those facts justify the petitioner's detention as being based upon "reasonable, articulable suspicion."

In 1968, the United States Supreme Court, in Terry v. Ohio, 392 US 188 S.Ct. 1868, 1880 (1968) authorized a search and seizure based on less than probable cause. Through the years, the Terry doctrine has expanded into other areas, but the underlying principles have never changed. The holding of Terry is that an

officer who has a reasonable, articulable suspicion that his safety is jeopardized, may pat down a suspect for the limited purpose of determining whether or not that person is armed. If in the process of that pat down, evidence is discovered, it may be used against the accused at trial.

The two main teachings of Terry which have consistently been applied to Fourth Amendment analysis are: (1) a principled distinction has to be made between inarticulate hunches and reasonable, articulable suspicion; and (2) the search must be reasonably limited in scope to the justification for the intrusion.

As to the first general principle, that of distinguishing between inarticulate hunches and reasonable articulable suspicion, the Terry court said:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those enforcing the laws can be subjected to the detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular circumstance. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate. [citations omitted] Anything less would invite intrusions upon constitutional rights based on nothing more substantial than inarticulate hunches, a result this court has consistently refused to sanction.

In 1981, the United States Supreme Court, in United States v. Cortez, _____ US _____ 28 Cr.L. 3051, 3053, (1981) said:

> This demand for specificity in the information upon which police action is predicated is the central teaching of this court's Fourth Amendment Juris Prudence." [emphasis in original text]

What one learns from this principle is that the suspicion referred to in Terry must be reasonable as measured against an objective standard. To distinguish a "hunch" from the constitutional "reasonable, articulable suspicion", the facts as articulated must justify a reasonable suspicion, pursuant to the objective standard.

As a matter of law, this Court could

not conclude that the facts and circumstances, as articulated by the police officer, rise to the level of "Terry" facts to allow petitioner continued detention.

The United States Supreme Court in Reid vs. Georgia, 100 S.Ct. 2752, (1980) was confronted with the following facts: the defendant arrived in Georgia from Florida in the early morning hours. He was separated from another man carrying the same type of luggage he was. Eye contact was made between the two men, but they kept themselves separated as they proceeded down the concourse. Then defendant looked backwards towards the other man as he was so moving. The other

person caught up with him at the baggage area and they left together. The defendant in Reid became nervous during the encounter with police and when asked if they could search the luggage he was carrying, he consented. As he was walking with them to the office, he bolted and abandoned the bag which was later discovered to contain cocaine. The Court concluded, at 100 S.Ct. 2754, as follows:

> We conclude that the agent could not as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances. Of the evidence relied on, only the fact that the petitioner preceeded another person, and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances describe a

> large category of presumably innocent travelers who would be subject to virtually random seizures were the court to conclude that as little foundation as there as in this case could justify the seizure. Nor can we agree on this record, that the manner in which the petitioner and his companion walked through the airport reasonably could have lead the agent to suspect them of wrong doing. Although there could, of course, be circumstances which wholly lawful conduct might justify the suspicion that criminal action was afoot, (See Terry vs. Ohio), this is not such a case. The agents believe the petitioner and his companion were attempting to conceal the fact that they were traveling together, a belief that was no more than inchoate and unparticularized suspicion or hunch, than a fair inference in the light of his experience is simply too slender a reed to support the seizure in this case. [citations omitted]

Consequently, the Supreme Court, in Reid, on facts much stronger held that as a matter of law, the agent could not have

reasonably suspected the petitioner of criminal activity on the basis of the articulated observed facts.

See also, United States v. Glass, 741 F.2d 83 (5th Cir. 1984), which provides another example of facts insufficient as a matter of law to justify a Terry type detention.

The United States Supreme Court most recently in United States v. Sokolow, _____ U.S. _____ 45 Cr.L. 3001 reaffirmed the teaching of Terry that these cases must be determined on an individual basis where it said:

> In Terry v. Ohio [citation omitted] we held that police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that

> criminal activity "may be afoot" even if the officer lacks probable cause.
>
> The officer, of course, must be able to articulate something more than an "inchoate or unparticularized suspicion or hunch". The Fourth Amendment requires "some minimal level of objective justification" for making the stop.

The Supreme Court reaffirmed specifically by reference thereto the Reid analysis.

The real question is whether this Court is going to permit detention of persons in clean cars, smelling of after shave, who look straight ahead when questioned.

In the instant case, there were three areas which the officer articulated as giving rise to the cause of continued

detention. The most important of those as articulated by the officer was petitioner's "nervousness". In articulating what he meant by the petitioner's "nervousness", his sole justification was that petitioner continued to look ahead instead of looking at the officer while he was talking to him. Under the objective standard, this cannot rise to the level of reasonable, articulable suspicion, but is more akin to a hunch. The second area that the officer articulates as justifying detention was the smell emanating from the vehicle. However, this smell was consistent with after shave lotion. The air fresheners he

found in the glove box could not have caused the smell because they were factory sealed in cellophane.

Regarding "cleanliness" of the vehicle, the officer did not "articulate" what it was about the "cleanliness" of the vehicle that gave rise to suspicion, and all of the items that he indicated skiers have the petitioner did have. Should police be allowed to detain persons in vehicles which are clean and smell of after shave lotion, if the driver is nervous, then Judge McKay's dissent in United States v. McCranic, 703 F.2d 1213 (10th Cir. 1983) would be appropriate where he said:

> The defendant's nervousness is supposed to add some justification

> for the police conduct that followed. I strongly doubt, however, that even a federal judge would not appear nervous under similar circumstances, no matter how innocent his behavior.

As a matter of law, this Court could not conclude that the officer, under the objective standard, had a reasonable, articulable suspicion to justify continued detention of petitioner.

## CONCLUSION

For the foregoing reasons, this Court should grant the Petition for the Writ of Certiorari to review this

important area of Fourth Amendment law.

Respectfully submitted,

BROWN & COX

KENNETH R. BROWN
10 West Broadway
Suite 500
Salt Lake City, Utah
(801) 363-3550
Attorneys for
Petitioners

## CERTIFICATE OF SERVICE

STATE OF UTAH )
ss.
COUNTY OF SALT LAKE )

COMES NOW Kenneth R. Brown of Brown & Cox, and having been first duly sworn, deposes and states as follows:

1. I am a member of the Bar of the Supreme Court of the United States.

2. That on the ___ day of _____ 1990, I deposited one original and 40 copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals, Tenth Circuit, in the United States post office located at Salt Lake City, Utah, addressed to the Clerk of the U.S. Supreme Court, Washington, D.C., 20543, first class

postage prepaid. Such filing was timely.

3. That on the ___ day of _____, I deposited three copies of the foregoing Petition for Writ of Certiorari in the United States post office located at Salt Lake City, Utah, addressed to Dee V. Benson, U. S. Attorney and Richard D. McKelvie, Assistant U. S. Attorney, 350 South Main Street, Salt Lake City, Utah, 84110.

4. That on the ___ day of _____ 1990, I deposited three copies of the foregoing Petition for Writ of Certiorari in the United States post office located at Salt Lake City, Utah, addressed to

Solicitor General, Department of Justice, Washington, D.C., 20530.

_____
KENNETH R. BROWN

SUBSCRIBED AND SWORN to before me this ____ day of _____, 1990.

_____
NOTARY PUBLIC
Residing at Salt Lake City, Utah

My Commission Expires:

_____

# APPENDIXES

# APPENDIX "A"

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | No. 89-4065 (D.C. No. 88-CR 213S) (D. Utah) |
| vs. | ) | |
| DAVID WELLS EDGAR, aka David Wayne Edgerly, | ) | |
| | ) | |
| Defendant-Appellant. | ) | |

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ORDER AND JUDGMENT*
(Filed May 21, 1990)

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Before MCKAY, LOGAN, and BALDOCK, Circuit Judges.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Defendant David Wells Edgar pleaded guilty to possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). His plea was conditioned on his right to appeal the district court's denial of his motion to suppress twenty-two kilograms of cocaine found in the car he was driving.

After a hearing on the suppression motion, the district court found the relevant facts as follows. Defendant was eastbound on Interstate-70 when he was stopped at a roadblock in Grand County, Utah, conducted by the Utah Highway Patrol and the Grand County Sheriff's Office to systematically check drivers' licenses and registrations. At the

request of Officer Curt Brewer, defendant produced a California license in the name of David Wayne Edgerly and a California registration in the name of Antonio Alberto Manduro. Defendant told the officer that he was driving the car with Manduro's permission and was to meet Manduro in Vail, Colorado, for a ski holiday. Officer Brewer returned the license and registration to defendant and asked him whether he was transporting alcohol, narcotics, weapons, or large sums of money in the vehicle. Defendant responded in the negative, and Officer Brewer then asked defendant for permission to search the vehicle for those items and specifically requested

permission to search the trunk. Defendant responded, "That would be fine." III R. 18. The subsequent search of the trunk produced the cocaine at issue.

The district court concluded that the roadblock stop was legitimate, as was the subsequent questioning, and that the defendant's consent to the search was voluntary. Therefore, the district court denied the motion to suppress. Defendant raises these same issues on appeal. We affirm.

I

The Supreme Court has expressed approval of roadblocks for the purpose of verifying licenses and registrations in

Delaware v. Prouse, 440 U.S. 648, 663 (1979), and this circuit has repeatedly upheld their use, see e.g., United States v. Corral, 823 F.2d 1389, 1392 (10th Cir. 1987), cert. denied, 486 U.S. 1054 (1988); United States v. Lopez, 777 F.2d 543, 547 (10th Cir. 1985); United States v. Diaz-Albertini, 772 F.2d 654, 658 (10th Cir. 1985), cert. denied, 484 U.S. 822 (1987); United Savings v. Obregon, 748 F.2d 1371, 1376 (10th Cir. 1984); United States v. Prichard, 645 F.2d 854, 856-57 (10th Cir.), cert. denied, 454 U.S. 1069 (1981). Defendant contends that the roadblock was pretextual, pointing to evidence that the officers exercised unbridled discretion in

deciding which cars to stop. There was conflicting evidence on this point, however, and the district court found that cars were waived through the roadblock only when all available officers were occupied with the searches and arrests of defendant and a man from another vehicle. This finding is not clearly erroneous.

II

Defendant next argues that Officer Brewer's questions about narcotics constituted a seizure without reasonable suspicion of illegal activity. When a person has been detained by a law enforcement official for a legitimate purpose, further investigatory detention,

short of an arrest, for a different purpose must be supported by the reasonable suspicion for an investigatory "stop" under Terry v. Ohio, 392 U.S. 1 (1968). See, e.g., Corral, 823 F.2d at 1392-93 (suspicion of narcotics activity arose after roadblock stop).

Determining whether an officer had an objectively reasonable and articulable suspicion of wrongdoing sufficient to justify a given intrusion necessarily turns on the facts and circumstances of each case. See United States v. Sokolow, 109 S.Ct. 1581, 1585 (1989). We must determine "whether the officer's action was justified at its inception, and whether it was reasonably related in

scope to the circumstances which justified the interference in the first place." Terry, 392 U.S. at 20.

Assuming that Officer Brewer's brief series of questions invoked Fourth Amendment protections, we hold that they were justified by a reasonable and articulable suspicion that defendant was involved in illegal activity. In addition to the fact that defendant was driving a car owned by someone else, Officer Brewer testified that although there was a pair of skis on top of defendant's car, the interior of the car was relatively barren and noticeably absent were other items he normally saw in skiers' cars. Officer Brewer also

detected a strong odor of perfume or deodorizer which he thought could be used to mask the smell of something else. Officer Brewer also said defendant was conspicuously nervous during their encounter, refusing to remove his sunglasses or look at Officer Brewer. The district court thought these circumstances justified Officer Brewer's brief questioning of defendant concerning illegal activities, and we agree. Cf. United States v. Espinosa, 782 F.2d 888, 891 (10th Cir. 1986) (officer's brief questions about narcotics put to men stopped at permanent immigration checkpoint justified by their hesitancy in answering previous questions,

temporary license plate, and lack of luggage for supposed vacation). These same circumstances justified Officer Brewer's request to search the car, cf. United States v. Gonzalez, 763 F.2d 1127, 1128, 1130 (10th Cir. 1985) (officer who stopped defendant for speeding and had suspicions based upon curious state of license and registration and strong smell of deodorizer could have requested defendant for permission to search car).

III

Defendant's only challenge to his consent to the search in that it was tainted by an illegal detention. This argument must fail in view of our conclusion that there was no illegal

detention, and the district court's finding that defendant's consent was voluntary is not clearly erroneous.

AFFIRMED.

Entered for the Court

James K. Logan
Circuit Judge

# APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff - Appellee, | ) | |
| | ) | |
| v. | ) | No. |
| | ) | 89-4065 |
| DAVID WELLS EDGAR, aka David Wayne Edgerly, | ) | |
| | ) | |
| Defendant - Appellant. | ) | |

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ORDER

Filed June 12, 1990

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Before McKAY, LOGAN and BALDOCK, Circuit Judges

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This matter comes on for consideration of appellant's petition for rehearing filed in the captioned case.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By:_____
Patrick Fisher
Chief Deputy Clerk